No. 14,516

IN THE

United States Court of Appeals

For the Ninth Circuit

JAMES ARENA,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Northern District of California, Southern Division.

REPLY BRIEF FOR APPELLANT.

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INTRODUCTION.

Appellee labors under a complete misconception of the requirements of corroboration in a perjury case and has, therefore, sought to apply principles of corroboration foreign to perjury cases. Throughout its brief it has resorted to gratuitous assumptions, unwarranted inferences and generalizations and distortions which, it is to be noted for remembrance, have been drawn in large part from evidence which at the trial and in our opening brief, as well, we denounced as inadmissible and incurably prejudicial to the substantial rights of appellant to a

fair trial. The record and observations hereinafter made will confirm what we have just stated.

Except to comment that "It is not required that the person testifying in respect to records have personal knowledge of their contents" (Appellee's Brief, p. 26) appellee has failed to otherwise comment upon or meet the arguments submitted by appellant in support of specifications of error 5 and 6 relating to the admissibility of the testimony of the witnesses, F. W. Whitted and Rosalind Heller. The arguments submitted in support of these specifications of error correctly state the law and the errors arising from the admission of the testimony of these two witnesses to which timely and proper objections were made so prejudiced the rights of appellant as to alone constitute grounds for reversal.

In this reply appellant relies essentially upon his main brief and proposes to discuss only those issues of law or questions of fact raised by appellee's brief.

THE COURT BELOW ERRED IN DENYING APPELLANT'S MOTION TO DISMISS THE FIRST COUNT OF THE INDICTMENT.

Appellee contends that count I of the indictment was not bad for duplicity, and in support thereof it cites *United States v. Harris,* 311 U.S. 292, 61 S.Ct. 217. We quote from the opinion at page 218, "The sole question presented by the two cases is whether the indictments charge an offense under the statute. (18 U.S.C.A. 231)." No question of duplicity was involved. Appellant fails to see how this case bears upon the question presented herein.

In *United States v. Goldstein,* 168 F.2d 666, cited by appellee, the defendant did not object to the form of the indictment because of duplicity, he did not request the withdrawal of any specific assignment of perjury in the one count; he did move for a dismissal of the indictment at the close of the government's case and again at the close of all of the evidence. Of this the Court said at page 671:

> "That is not the equivalent of a request for a restricted submission. In the absence of such request and its denial, it is enough that one assignment in the count was adequately proved."

Appellant in the instant case made a timely motion for the dismissal of count I of the indictment which was denied (R. 12-15). This objection was not waived by appellant as occurred in the *Goldstein* case, nor was the prosecution in any way prejudiced by any failure to make proper and timely motions as occurred in the *Goldstein* case.

Rule 7(c) of the Federal Rules of Criminal Procedure provides that, "The indictment . . . shall be a plain, concise and definite written statement of the essential facts constituting *the offense* charged . . ." The indictment is sufficient if it clearly informs the defendant of the precise offense with which he is charged so that he may prepare his defense. *Barron, Federal Practice and Procedure,* Vol. 4, page 63.

Appellant submits that count I of the indictment is duplicitous and not in conformity with good pleading; that timely and proper motions were made to give the

government an opportunity to correct this defect; that the government has not been prejudiced by any waiver or failure by appellant; and that appellant was prejudiced in the preparation of his defense because of the multiplicity of offenses charged in count I of the indictment.

Also in this connection, appellee cites *United States v. Coen,* 72 F. Supp. 10 for the proposition that "it was proper to charge in a single count the commission of the crime of perjury by including other assignments of falsity *with respect to the same transaction*" (italics supplied). (Appellee's Brief, p. 29.) In the same breath, the Court says:

> ". . . where, as here there were several separate transactions, none of which has any relation or connection with the other, the false swearing, even though given in the course of continuous testimony in the trial of the contempt case, constituted separate offenses, and should have been charged in three counts of the indictment instead of one." (p. 12)

In the same opinion, the Court said:

> ". . . In a trial, the jury might conclude that the defendant's statement was true as to one or more of these transactions, but false as to the others and there would be no way of determining in event of a verdict of guilty, since there is only one count in the indictment, whether the finding applied to one, or to all three affidavits. These circumstances would seem to clearly establish the distinct nature of the several transactions and that the false swearing as to each one constitutes a separate crime, although given in one continuous appearance upon the witness stand." (pp. 12-13)

Appellant contends that count I of the indictment is subject to the same objections and that his motion to dismiss was, therefore, erroneously denied. The instant indictment does not involve the question of other *assignments* of falsity with respect to the same transaction.

Greenbaum v. United States, 80 F. 2d 113, *United States v. Crummer,* 151 F. 2d 958, both involving mail fraud indictments, and *Hovely v. United States,* 277 Fed. 788, involving an indictment under the Mann Act, are properly cited by appellee, but for a proposition which does not bear upon appellant's objection to the indictment in this case. Such indictments, because of the very nature of the offense to be charged, must necessarily set forth at least a minimum of factual allegations as to the means of committing the offense.

We repeat, that the crime of perjury is complete when a false answer is knowingly given to a question material to the inquiry, that a separate offense is committed when such answer is given to each such material question, and that count I of the indictment herein sets forth four such separate offenses.

THE COURT BELOW ERRED IN DENYING APPELLANT'S MOTIONS FOR JUDGMENT OF ACQUITTAL.

Unquestionably, appellant's specifications of error Nos. 2, 3, and 4 are based upon the well-established rule in perjury cases that the falsity of the oath must be proven by two witnesses or by one witness and corrborating evidence.

State v. Storey, 182 N.W. 613, cited by appellee, recites, with reference to the "two witness" rule, as follows:

> "This rule has been generally relaxed, but the greater number of decisions still sustain the rule that the positive testimony of at least one witness should be required, and if there is but one such witness, that *his testimony must be corroborated as to material facts;* that 'oath against oath' is never sufficient." (Italics supplied.)

Professor Wigmore, who is quoted by appellee, recognizes the fundamental soundness of the rule, approaching the underlying reasons therefor as follows:

> ". . . But when we consider the very peculiar nature of this offense, and that every person who appears as a witness in a Court of Justice is liable to be accused of it by those against whom his evidence tells, who are frequently the basest and most unprincipled of mankind, . . ., we shall see that the obligation of protecting witnesses from oppression, or annoyances, by charges, or threats of charges of having borne false testimony, is far paramount to that of giving even perjury its deserts. . . ." *Wigmore,* 3d Ed., §2041.

The case of *Marvel v. State,* 131 A. 317, although rejecting the rule, states:

> "Even a casual examination of the authorities establishes the fact that the most universal rule in other jurisdictions is that no conviction can be had in a perjury case without the direct evidence of two witnesses or of one witness with corroborating evidence of some character."

It is interesting to note that in both the *Storey* and *Marvel* cases, the question was one of first impression

within the respective jurisdictions and also that in the *Storey* case the evidence emanated from the defendant, and in the *Marvel* case three witnesses testified to facts so conclusive and contradictory to the alleged perjurious testimony of the defendant so as to remove any dangers of falsification by prosecution witnesses and leave little room for doubt as to the falsity of the defendant's oath.

Appellee attributes to appellant admissions that he (appellant) placed bets with Mr. Heller over a period of years and that there was a net win in favor of Arthur Samish on November 30, 1947 (Appellee's Brief, page 14). A simple reading of Appellant's Opening Brief will disclose that in pointing out the utter failure of proof of the perjury charged, counsel for appellant indulged in every presumption and inference favorable to the prosecution, but in no sense waived appellant's objections to the admissibility of evidence or the use of exemplars as substantial evidence of the charge contained in count I of the indictment.

We repeat that there is an absolute lack of corroboration of Irving Baskin's testimony that in December, 1947, he turned $38,000.00 over to appellant at a bank in Oakland.

Appellant does not contend that the government should be compelled to prove its case twice; however, appellant does contend that the cases cited in his opening brief at pages 47, 48 and 49 properly set forth the quantitative rule of evidence to be applied by the federal Courts in perjury cases and that rule was not applied in the instant case.

Appellee's brief incorrectly attributes to appellant the proposition that "the corroborative evidence must "of itself" prove guilt. Appellant does contend that where the government seeks to establish perjury by the testimony of one witness and corroborating evidence, the latter must be independent of the former and inconsistent with the innocence of the defendant and that the corroborative evidence must tend to show the perjury independently of the testimony of the direct witness.

Pearlman v. United States, 10 F. 2d 460, 462, cited by appellee (Appellee's Brief, p. 15) was a prosecution under the National Motor Vehicle Theft Act of 1919. That case can by no manipulation of reasoning bear upon the questions presented in this appeal. This is best illustrated by quoting from the Court's opinion at page 461:

> "The single question for this court to determine upon this writ of error is whether the proofs of the government measure up to the rule that there must be testimony tending to prove the corpus delicti independent of any confession of defendant . . ."

Smith v. United States, 348 U.S. 147 and *Opper v. United States,* 348 U.S. 84, cited by appellee (Appellee's Brief, p. 15, footnote) as approving the *Warszower* case, indeed do so, but again these cases deal with the question of the admissibility of extrajudicial confessions and admissions and the necessity of proof of the corpus delicti to render such statements admissible in evidence. The corroborating evidence there lays the foundation for the admission of extrajudicial admissions and confessions. In

perjury cases corroboration is required which tends to show the perjury independently—without regard to the testimony of the direct witness. The corroborating evidence in perjury cases cannot be considered in conjunction with the direct witness in perjury cases to determine whether or not the quantitative "two witness" rule of evidence has been satisfied. It must be independent of the testimony of the direct witness and inconsistent with the innocence of the defendant. *U. S. v. Neff,* 212 F. 2d 297, 307, and cases cited in appellant's opening brief, pages 48 and 49.

The case of *D'Aquino v. United States,* 192 F. 2d 338, also cited by appellee (Appellee's Brief, p. 15) only serves to further point up the fallacy of appellee's argument by stating, at page 357:

> "This court has held that it is unnecessary to make full proof of the *corpus delicti* independently of the defendant's confessions . . . The corroborative evidence need not independently establish the *corpus delicti* beyond a reasonable doubt. It is sufficient if the corroborative evidence, when considered in connection with the confession or admission, satisfied the jury beyond a reasonable doubt *that the offense was in fact committed . . .*" (Italics supplied.)

Clearly the Courts in these cases cited by appellee were discussing the foundation necessary to render admissible the confessions or admissions of the defendant, a matter completely foreign to the question of corroboration in perjury cases where there is but one witness who testifies directly to the falsity of the defendant's alleged perjurious statement.

The foregoing observations adequately demonstrate the illogical manner in which appellee has approached appellant's specifications of error 2, 3 and 4.

Appellee makes brief reference to "corroboration" in rape cases. (Appellee's Brief, p. 16.) The corroboration necessary in rape cases is *any* circumstantial evidence which supports the *prosecutrix's story. Ewing v. United States,* 135 F. 2d 633 at page 636. The corroboration necessary in perjury cases must tend to show the *perjury* independently of the testimony of the direct witness.

Appellant cannot agree with appellee's assertion that "this Court has treated corroboration in perjury cases analogously to that required in the other cases where corroboration is necessary." In citing *Vetterli v. United States,* 198 F. 2d 291 at page 293, counsel for appellee fails to point out to the Court that the *defendant's admission* was there under consideration. Of course, where the evidence emanates directly from the defendant the rule generally applied in perjury cases has been relaxed. We must not overlook the fact that in the *Vetterli* case there were three corroborating witnesses, in addition to the direct witness, all of whom contradicted the alleged perjurious statement of defendant, and one of whom testified as to admission of the defendant Vetterli. Thus, the analogy to other types of cases where admissions of a defendant must be corroborated.

Appellee's analysis of *United States v. Hiss,* 185 F. 2d 822, (Appellee's Brief, p. 16) is also oversimplified and distorted. The Court there stated the general rule at page 824 that:

> "(the) corroboration of the testimony of a single witness should be such that it supplies independent proof of facts inconsistent with the innocence of the accused . . ." (Italics supplied.)

In almost six pages of the opinion the Court reviewed the evidence against Mr. Hiss after which the Court states at page 830:

> ". . . The foregoing is an attempt NOT to summarize the *MASS OF EVIDENCE* introduced at the trial below, . . ."

This is but one illustration of appellee's method of resorting to distortions and generalizations.

Likewise, in summarizing the evidence in *United States v. Henderson,* 185 F. 2d 189 (Appellee's Brief, p. 17) appellee fails to accurately inform the Court as to all of the corroborating evidence upon which the conviction was sustained. Furthermore, in the *Henderson* case the Court states, at page 192, that the jury was not instructed as to necessity of more than the testimony of a single witness; that the defendant did not tender or request such an instruction, that defendant did not object to the instructions as given by the trial Court, and that on that state of the record there was no grounds for reversal.

The case of *Miranda v. United States,* 196 F. 2d 408, cited by appellee (Appellee's Brief, p. 17) was a prosecution under Section 746 (a)(1) of Title 8 U.S.C.A. for making false statements under oath as a witness in naturalization proceedings. Falsity of the statement was there admitted by the defendant. The sole issue was

whether or not the defendant had made the statement which he admits, *if it were made,* was false. Furthermore, the corroborating evidence was a notation, made by the direct witness some four years prior to the return of the indictment, of facts related to the direct witness by the defendant at that time. That notation was contained in the records of the Department of Justice, Immigration and Naturalization Service and was admissible in evidence as such (28 U.S.C.A. 1733). In effect, this was corroborative evidence emanating from the defendant—the best possible type of corroboration. But it must be borne in mind that this type of argument is beyond the question presented by specifications of error 2, 3 and 4, since there is no corroboration whatsoever of Irving Baskin's testimony that in December, 1947, he turned over thirty-eight one thousand dollar bills to appellant at a bank in Oakland.

Appellant does not contend that corroboration of the testimony of the direct witness cannot be established by circumstantial evidence contrary to the assertions of appellee. Nowhere in appellant's opening brief does appellant express the opinion that "only direct testimony that Baskin transferred the money to him in addition to Baskin's testimony that the money was so transferred would be sufficient to establish the charge" contained in count I of the indictment (Appellee's Brief, pp. 17 and 18). Of course, these propositions are contrary to well-established law as applied in perjury cases as cited by appellant in his opening brief at pages 34 through 49. Appellant does contend that the corroborating evidence must be strong, clear and convincing, it must

be inconsistent with the innocence of the defendant, and it must tend to show the perjury independently of the testimony of the direct witness.

Appellee's argument at pages 20 through 25 under the heading, "The Corroboration Was Sufficient" is the only attempt by it to meet squarely the issues raised by appellant's specifications of error Nos. 2, 3 and 4. All of the preceding argument (Appellee's Brief, pp. 12 through 20) is an attempt by appellee to obscure the real issues and is designed to mislead the Court in its determination of this appeal. As has hereinbefore been demonstrated, the principles of law there contended for fly in the face of well-established law pertaining to perjury. The absence of legislation in derogation of this rule of law indicates that it is sound and satisfactory in practice. *Weiler v. United States,* 323 U.S. 608, 610, 65 S.Ct. 548, 550.

This portion of appellee's argument is its only attempt to summarize the evidence. It is interesting to note that the subject of the indictment is further skeletonized as follows: "The subject of the indictment . . . was appellant's sworn testimony that he had not accepted $38,000 from Irving Baskin on behalf of Samish." (Appellee's Brief, p. 21). Appellee gratuitously lends the name of Samish to this statement of the charge while in arguing that the indictment was not duplicitous it summarized count I of the indictment as follows: "The first count alleges in substance that the defendant falsely swore that he had not received $38,000 from Mr. Baskin at a bank in Oakland." This is a direct admission by appellee that the indictment is duplicitous and did not apprise

appellant of the precise nature of the offense with which he was charged.

In summarizing F. W. Whitted's testimony, appellee ignores the facts that this testimony is hearsay insofar as it relates to the meaning of symbols and initials used by Mr. Heller, that Whitted's association with Heller terminated prior to the date of the alleged offense, and that it was Baskin's practice to go to the bank to obtain cash for Mr. Heller which he delivered to Heller at the latter's office. But even ignoring these facts and taking the "established facts" as contended for by appellee, there is not one of these "established facts" that tends to show that appellant went to the bank in Oakland with Baskin and there received $38,000 from him. There is nothing in these "established facts" that is inconsistent with the appellant's innocence of the offense charged.

Appellee distorts the evidence in stating, "Whitted further testified that from the year 1945 *all* settlement of Samish's bets were made with appellant" (Appellee's Brief, p. 21). The strongest inference that can be drawn from Whitted's testimony in this regard is that prior to 1945 he, Mr. Whitted, had made settlements with Mr. Samish and that after 1945 he personally had not participated in settlements of Samish bets but sometimes was present when Heller made settlements of these bets with Arena. This is a far cry from stating that *all* settlements of Samish's bets were made with Arena after 1945. We must remember that Whitted was not associated with Heller after October of 1947 and, therefore, did not have any knowledge whatsoever as to the manner in which the alleged win attributed to Samish on Novem-

ber 30, 1947, of $34,800 was settled or paid, if settled or paid at all.

Giving Mrs. Heller's hearsay testimony that "S.A." meant "Artie Samish Account to James Arena" full credence and effect, we still cannot say that appellant testified falsely when he denied having received $38,000 from Baskin at a bank in Oakland or at any other place. This in effect is the testimony of Baskin which must be corroborated.

Assuming, as contended for by appellee, that a bet was paid *by Heller to James Arena* on behalf of the "S.A." account on October 30, *1946,* (Appellee's Brief, p. 22) appellant fails to see how this assumed fact is in any way inconsistent with the fact that appellant did not receive $38,000 from Baskin at the Oakland bank in December, 1947. Baskin's testimony went to a specific transaction and evidence of other acts which appellee again assumes to be "established facts" in no manner or degree corroborates that direct testimony, a conclusion which both appellant and appellee agree upon (Appellee's Brief, p. 23).

Perhaps the most glaring example of the unwarranted and gratuitous assumptions by appellee occurs at page 20 of its brief wherein it states that the bank teller, Herman Worth, was dead. Counsel for appellant has carefully searched the record for evidence to support this positive statement of fact and can find no foundation for it. Appellee refers to page 187 of the transcript of record, but this was merely the prosecution's argument to the jury, which the government cannot presume to be evidence.

Appellee does not deny that its failure to call a witness whose testimony would elucidate the transaction, gives rise to a presumption that the testimony if produced would be unfavorable. Of course, the same presumption arises upon the government's failure to call Arthur Samish who, like Herman Worth, would be in a position to corroborate Baskin's testimony as to his disposition of the $38,000, if it be true.

Contrary to the assertions of appellee, appellant in his opening brief does make a forthright analysis of of the exhibits and the testimony, and in discussing the evidence he draws every inference favorable to the prosecution (Opening Brief, pp. 36-46). The stellar concession which appellee makes appears at page 24 of appellee's brief as follows: "Baskin's testimony was corroborated in every detail except *one* . . ." And that *ONE* is the very fact at issue, the basis of the perjury charge. From there, appellee suffers a relapse into the fallacious argument that corroboration of a direct witness in perjury cases is analogous to the corroboration required to render an extrajudicial confession or admission admissible in evidence or that degree of corroboration of the prosecutrix's testimony upon which a rape conviction may be sustained. That there is no basis in fact or in logic for such analogy has hereinbefore been demonstrated.

ADMISSIBILITY OF GOVERNMENT EXHIBITS NOS. 2, 3, 4, 6, 7, 9, 10 AND 15.

Appellee did not choose to argue the inadmissibility of Government Exhibits Nos. 9, 10 and 15, therefore appellant will rest upon the authorities cited in his opening brief as to those exhibits.

Appellee asserts that Exhibits Nos. 2, 3, 4, 5, 6, 7 and 8 were identified as Heller's business records and that the handwriting therein contained was Heller's. Appellee also states that "Irving Baskin, F. W. Whitted and Mrs. Heller all testified to the manner in which these books were kept." (Appellee's Brief, p. 25). Appellant agrees that the handwriting in these exhibits was identified as Mr. Heller's. Appellant cannot agree that there is testimony as to the manner in which those business records were kept. Certainly there is no unequivocal expression by any witness that Exhibit No. 3 was a record kept by Mr. Heller in the regular course of his business. As to the other exhibits there was, at best, testimony that Heller had been making entries in books *of that sort,* or *books like this,* or books *of that type.* The foundation laid for the admission of business records in *Harper v. United Sates,* 143 F. 2d 795, cited by appellee, is much different than that in the instant case for in the *Harper* case the witness was auditor and secretary of the company whose records were being offered and he testified that the records were made by him or by bookkeepers under his supervision. Other records involved in the *Harper* case were identified by the custodian thereof as the business records kept in the regular course of business. The case of *Wheeler v. United States,* 211 F. 2d 19, 23, cited by appellee does not sustain appellee's posi-

tion since in that case and in *Landay v. United States,* 108 F. 2d 698, 704, 705, upon which the Court in the *Wheeler* case relies, the custodian of the record or the person who actually made the record testified as to the course of business in which the records were kept and the regularity thereof. *Lewis v. United States,* 38 F. 2d 406, cited by appellee, contains no statement as to what evidence was considered to be sufficient foundation for admission of the business records. There is merely a bald statement, at page 414, that "It was shown that the books produced were the books of account of the company kept for the purpose of recording the business transactions in which the company was involved. This was a sufficient foundation for their introduction *for the purpose for which they were offered.*"

Appellee, in its brief at page 26, makes the bare statement that "It has been universally held that persons familiar with the record may testify as to the meaning of abbreviations used in it." *Meyer v. Everett Pulp and Paper Co.,* 193 F. 857, cited by appellee, holds that *parties to a contract* may explain obscure or ambiguous portions of that contract. The parol evidence rule is there under consideration, while appellant's specifications of error Nos. 5 and 6 raise the objection that certain testimony of F. W. Whitted and Mrs. Heller was hearsay or opinion and conclusion. Likewise, the annotations contained in 100 A.L.R. 1465, cited by appellant, deal only with the parol evidence rule and so have no bearing on the questions presented by this appeal.

Appellee seeks to excuse its failure to lay a proper and sufficient foundation for the admission of Heller's

business records in evidence upon the fact that Mr. Heller was dead (Appellee's Brief, p. 27). Appellee concedes that none of the witnesses were custodians of Heller's records or made or supervised the making of those records. Not one of the witnesses testified that those records were made in the regular course of business. Not one of the government's witnesses could or did testify as to the course of Mr. Heller's business in which any records were kept. These are indispensable elements of a proper foundation upon which business records may be admitted in evidence under Section 1732 of Title 28, U.S.C.A. which explicitly states that such records are admissible as evidence *"if made in regular course of any business, and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter."* (28 U.S.C.A. 1732.)

See also:

Palmer v. Hoffman, 318 U.S. 109, 115, 63 S.Ct. 477, 481;

Masterson v. Penn. R. Co., 182 F. 2d 793, 797.

INSTRUCTIONS REQUESTED BY APPELLANT.

While considering appellant's specifications of error Nos. 8, 9 and 10, we must bear in mind that the government had the burden of proving, by evidence measuring up to the quantitative rule of evidence applied in perjury cases by the federal Courts, that appellant received $38,000 from Irving Baskin at a bank in Oakland. Ap-

pellee apparently contends that the corroboration is sufficient if it substantiates the testimony of the direct witness in *any regard.* We submit that this is contrary to the law as determined from the cases cited by both appellant and appellee. The corroborating evidence must be clear, direct and positive, and it must be inconsistent with the innocence of the defendant,—it must relate to the falsity of the alleged perjurious testimony.

Appellee asserts that appellant's requested instruction No. 12 demonstrates the admissibility of the evidence to which that instruction was directed (Appellee's Brief, p. 32). This type of argument ignores the fact that this evidence had already been erroneously and irrevocably admitted by the trial Court, and that at that stage of the proceedings it was incumbent upon counsel for appellant to offer instructions which would alleviate the gravity of the error committed in the admission of the evidence complained of in specification of error No. 5.

With relation to specification of error No. 12, contrary to the assertion in appellee's brief, page 32, appellant does not contend that the jury should be instructed "that the corroborative evidence must of itself establish the guilt of the defendant beyond a reasonable doubt," but appellant does assert that the corroborative evidence must "tend to show the perjury independently." It must relate to the *falsity* of the alleged perjurious statement. A bank record which "substantiates the testimony of the witness who has testified directly as to the falsity of the defendant's statement" is not enough since it places the emphasis on the substantiation of the *witness* instead of upon the substantiation of the *falsity of the*

defendant's statement. See argument in appellant's opening brief, pages 72-76.

Dated, San Francisco, California,
June 6, 1955.

Respectfully submitted,
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